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No. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RICHARD T. GOSSER, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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October 28, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner respectfully requests rehearing of the order of October 11, 1965, which denied the petition for writ of certiorari in this case.

I. The Jencks Act Question

The first question presented by the Petition for Certiorari was whether the Court of Appeals for the Sixth Circuit had fallen short of affording the requisite appellate review when it affirmed the trial judge's Jencks Act ruling without ever itself making an appellate examination, *in camera* or otherwise, of the documents which the trial judge had ruled were not Jencks Act "statements" and hence could be withheld from the defense (Petition for Certiorari, p. 2). The Petition for Certiorari (pp. 14-16) pointed out that in every other circuit except the Sixth Circuit—where the present case was decided—it appeared to be the uniform procedure for the Court of Appeals in Jencks Act cases to make an actual examination for itself, usually *in camera*, of whatever documents the trial judge had ruled could be withheld from the defense; and that the failure of a Court of Appeals to do this was a serious failure of the appellate process, contrary to what the Jencks Act contemplated.

A very recent issue of the F. 2d advance sheets, dated October 4, 1965, shows that the Sixth Circuit has now modified its practice to bring itself into conformity with the other circuits. This appears from the Sixth Circuit's decision in *United States* v. *Hoffa*, 349 F. 2d 20, 48. There the trial judge had denied a defense motion to require the Government to produce certain documents under the Jencks Act, and on appeal the Court of Appeals expressly stated: "We have also examined the notes and sheets and agree that they were not producible."

There is nothing to indicate whether or not this change in the Sixth Circuit's practice has been, at least in part, a response by the Sixth Circuit to the claim of

serious injustice which was advanced in the Petition for Certiorari in the present case. But in any event, the change now has been made clear. The change leaves this petitioner not only deprived of the appellate review he would have had in any other circuit, but deprived also of the appellate review which now he would receive even in the Sixth Circuit from which this case has come. The principle that seriously discriminatory injustice should be corrected was applied in a decision rendered by this Court only a few days ago, *Gondeck* v. *Pan American World Airways, Inc.*, No. 919, O.T. 1961, decided October 18, 1965, in circumstances that appear far less compelling than the present case; and, to borrow a thought from what this Court said in *Gondeck,* of all those persons who are eligible to receive the full and proper appellate review contemplated by the Jencks Act, "this petitioner stands alone in not receiving it". Such completely discriminatory treatment, made manifest by this new development, should be remedied at least to the extent of remanding the case to the Sixth Circuit so that this matter can be considered anew in the light of the Sixth Circuit's current practice.

II. The Entrapment Question

The second question presented by the Petition for Certiorari (pp. 2-3) involved the proper division of functions between the judge and the jury in connection with issues of entrapment. This included the question whether the fair scope of the Sixth Amendment's guaranty of trial by jury applies to the entrapment issue as raised in this case, particularly in the light of the circumstance that the entrapment issue here turned largely on the credibility of witnesses whose credibility

was also required to be weighed by the jury in determining guilt or innocence. In discussing this question, the Petition for Certiorari (pp. 16-17) referred to the manner in which such problems recur in the lower federal courts.

Recent issues of the F. 2d advance sheets emphasize the current importance of such problems and the need for more definitive guidance from this Court. Thus, subsequent to the filing of the Petition for Certiorari in this Court on May 22, 1965, there have been published in the F. 2d advance sheets (beginning with 343 F. 2d, No. 3, dated May 24, 1965) at least a dozen decisions in the various Courts of Appeals which have had to wrestle with the problem of entrapment;[1] and nearly all of these have dealt with the allocation of functions between judge and jury when entrapment is an issue. And there are at least three additional decisions in the recent Court of Appeals slip opinions, not yet published in F. 2d, which likewise concern themselves with the same problem.[2] These developments, evidencing the fact that entrapment has been assuming a new prominence in federal criminal cases, underscore the need

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[1] *United States* v. *Torres*, 343 F. 2d 750, 751 (2d Cir.); *United States* v. *Smith*, 343 F. 2d 847, 850 (6th Cir.); *Waker* v. *United States*, 344 F. 2d 795 (1st Cir.); *United States* v. *Ball*, 344 F. 2d 925, 926 (6th Cir.); *United States* v. *Saucedo*, 346 F. 2d 371 (7th Cir.); *Cross* v. *United States*, 347 F. 2d 327 (8th Cir.); *United States* v. *Burkhart*, 347 F. 2d 772, 775 (6th Cir.); *Banks* v. *United States*, 348 F. 2d 231, 236 (8th Cir.); *Jordan* v. *United States*, 348 F. 2d 433 (10th Cir.); *United States* v. *Laverick*, 348 F. 2d 708 (3d Cir.); *Ortega* v. *United States*, 348 F. 2d 874 (9th Cir.); *United States* v. *Morrison*, 348 F. 2d 1003 (2d Cir.).

[2] *United States* v. *Caro*, No. 14980, 7th Cir., decided September 16, 1965; *Roy* v. *United States*, No. 18285, D.C. Cir., decided September 2, 1965; *United States* v. *Osborn*, No. 16056, 6th Cir., decided August 27, 1965.

for this Court to give plenary consideration to the important entrapment questions tendered by petitioner.

CONCLUSION

For these additional reasons, as well as the reasons previously advanced in support of the Petition for Certiorari, it is urged that rehearing should be granted, the order denying certiorari should be vacated, and certiorari should be granted.

Respectfully submitted,

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October 28, 1965

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

BENNETT BOSKEY